PD-1279-19
COURT OF CRIMINAL APPEALS
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No. PD-1279-19

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
3/24/2020
DEANA WILLIAMSON, CLERK

RAMIRO CASTILLO-RAMIREZ, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Cause 16-CR-271, Starr County
and No. 04-18-00514-CR, San Antonio Court of Appeals

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STATE PROSECUTING ATTORNEY'S BRIEF ON THE MERITS

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- The parties to the trial court's judgment are the State of Texas and Appellant, Ramiro Castillo-Ramirez.

- The trial judge was Hon. Martin Chiumimatto, Visiting Judge, sitting for the 381st Judicial District Court, Starr County, Texas.

- Counsel for Appellant at trial was Jesus "Chuy" Alvarez, 501 N. Britton Ave., Rio Grande City, Texas 78582.

- Counsel for Appellant on appeal were Linda Gonzalez, Chief Public Defender, and Jessica Anderson, First Asst. Public Defender, Texas RioGrande Legal Aid, Inc., 310 East Mirasoles Street, Rio Grande City, Texas 78582.

- Counsel for the State at trial were Gilberto Hernandez-Solano and Alex Barrera, Assistant District Attorneys, 401 N. Britton Ave., Starr County Courthouse, 3rd Floor, Suite 417, Rio Grande City, Texas 78582.

- Counsel for the State before the Court of Appeals were Gilberto Hernandez-Solano (original brief) and Andrew Whitlock (motion for rehearing), Assistant District Attorneys, Starr County Courthouse, 401 N. Britton Ave., Suite 417, Rio Grande City, Texas 78582.

- Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The jury charge in this aggravated sexual assault case should have consistently stated that penetration "by the defendant's sexual organ" was a requirement for conviction. This was the indictment allegation. But the error was not harmful. The only reason the court of appeals appears to have found otherwise is that it misread the record and confused which means of sexual assault was contested.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was not granted.

STATEMENT OF THE CASE

Appellant was indicted for aggravated sexual assault of an elderly individual, specifically by means of his sexual organ.[1] The jury charge was not so limited.[2] He was convicted and assessed a ten-year sentence and a $5,000 fine.[3] Appellant raised the jury-charge error for the first time on appeal. The court of appeals found it egregiously harmful.[4]

GROUND FOR REVIEW

> Can error in a sexual-assault charge—which fails to specify that the defendant used his penis—be harmful when there was no evidence or claim that he used anything else?

STATEMENT OF FACTS

The indictment included a single aggravated sexual-assault allegation: penetration of the elderly victim's anus "by [Appellant's] sexual organ."[5] The

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[1] 3 RR 37; CR 9; TEX. PENAL CODE § 22.021(a)(1)(A)(i) ("causes the penetration of the anus … of another person by any means, without that person's consent"), (a)(2)(C) ("the victim is an elderly individual …").
[2] 5 RR 194-200; CR 64-70.
[3] CR 70, 78, 80.
[4] *Castillo-Ramirez v. State*, No. 04-18-00514-CR, 2019 WL 3937270 (Tex. App.—San Antonio, Aug. 21, 2019, reh'g denied Nov. 26, 2019) (not designated for publication).
[5] CR 9.

State's theory of the case was that Appellant anally and then vaginally penetrated the victim with his penis. The jury heard the following evidence at trial.

The victim and Appellant's prior sexual relationship.

In October 2015, Appellant started doing odd jobs for the victim.[6] She was 70; he was in his forties.[7] The two began a consensual sexual relationship.[8] It ended when she discovered he bet another man $200 that he would go to bed with her.[9]

On one occasion, the timing of which is unclear,[10] she found him waiting outside her home, and he tried to grab and embrace her.[11] She asked a neighbor for help, but eventually fought him off herself.[12] This resulted in a protective order against Appellant.[13] The order's duration was not established.

The victim's account of the rape.

On July 29, 2016, Appellant came by asking for work.[14] She agreed, and they made several trips together moving furniture to her house.[15] They took a break for

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[6] 3 RR 64-65.
[7] 4 RR 78.
[8] 3 RR 66.
[9] 3 RR 65-67, 110-12; 4 RR 66-67, 82.
[10] It is unclear if it was before or after their sexual relationship. 3 RR 108-10; 4 RR 50-51.
[11] 3 RR 67-69.
[12] 3 RR 67-69, 109; 4 RR 34-35.
[13] 4 RR 50, 79.
[14] 3 RR 72.
[15] 3 RR 73.

lunch in the house, and then he went back outside.[16] She was in the kitchen when she noticed him in her bedroom and asked what he was doing there.[17] He walked toward her and grabbed onto her.[18] She pushed him, and he said, "No one pushes me."[19] She could smell beer on his breath and knew she was "in trouble" like the time before and had to get away from him.[20] He caught her and pushed her into the bedroom.[21] When he threw her on the bed, she ran to the other side, and when he caught up to her, she grabbed a glass dish off the dresser and hit him on the head.[22] He said, "Look what you did to me, [stupid]."[23] She said, "But look what you're doing to me, [Appellant]."[24] He told her she was going to hell and took off his clothes.[25] He told her, "This is what's going to happen to you every time you [are a bitch/are one of the "ladies" who is with other men]."[26] She got into the closet but was trapped there.[27] Her leg was pinned, and she was hurting.[28] He agreed to let her

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[16] 3 RR 74.
[17] 3 RR 74, 80.
[18] 3 RR 81.
[19] 3 RR 82; 4 RR 38.
[20] 3 RR 82-85; 4 RR 37-38.
[21] 3 RR 84-85.
[22] 3 RR 84, 86; 4 RR 37-38.
[23] 3 RR 86 (Spanish in original).
[24] 3 RR 87.
[25] 3 RR 87.
[26] 3 RR 88-89; 4 RR 80.
[27] 3 RR 88-89.
[28] 3 RR 89.

up if she promised she wouldn't do anything.[29] He removed all her clothes.[30] He picked her up and put her face down on the bed.[31] As the victim explained, "[T]hat's when he takes me"; "he enters my back."[32] She guessed that the anatomical term in English was "colon."[33] She also recognized "anus" as another word for it.[34] It hurt a lot.[35] She testified that she "felt his thing in there… [w]hat the man have."[36] The prosecutor clarified:

> Q: Is it a private part?
>
> A: Yes, his private part.
>
> Q: Okay. And – and what do you call it?
>
> A: Me? *Cositas*.[37]
>
> Q: Have you – do you know if it's called a penis?
>
> A: Oh, yes. I've heard of it, yes.
>
> Q: Okay. But that's not what you call it?

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[29] 3 RR 89-91.
[30] 3 RR 94-95.
[31] 3 RR 90-91.
[32] 3 RR 91.
[33] 3 RR 91.
[34] 4 RR 80.
[35] 3 RR 91.
[36] 3 RR 92.
[37] The witness was not asked for a translation. Translate.google.com indicates it means "little things" in Spanish.

A: I don't – I don't use those words.

Q: Okay. And – and—and is that how he entered your back?

A: Yes.[38]

He penetrated her anus for about fifteen or twenty minutes, with the victim turning her head toward him to one side and then the other and yelling that it was hurting and for him to leave.[39] As she turned, he slapped the side of her face and told her, "Shut up."[40]

At some point, he "went to . . . her vagina" while she remained face down on the bed.[41] She knew he had enjoyed himself because he said that it was "good."[42] She told him her son would soon be home and suggested Appellant wouldn't want to be found by her son. Appellant responded, "Let him come… I have enough for him, too."[43] He put his clothes on and threatened to "come back and kill [her]" if she "sen[t] him to jail."[44]

That afternoon, she went to a justice of the peace she knew, and the police

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[38] 3 RR 92.
[39] 3 RR 92-94.
[40] 3 RR 93-94.
[41] 3 RR 94.
[42] 3 RR 95; 4 RR 75-76.
[43] 3 RR 96.
[44] 3 RR 96.

were called in shortly thereafter.[45] She was interviewed at the police station.[46] The responding officer observed bruising, scratches on her breasts, and a gash on the top of her head.[47] Back at the victim's home, the officer observed that her bed was messy and the container she described hitting him with was on the dresser.[48] The officer found and collected a wad of toilet paper from the sink that the victim said she had wiped with after the assault.[49] The victim's son took her to the hospital for a sexual assault exam.[50]

The SANE's account of the victim's exam and statements.

At trial, the sexual assault nurse examiner testified to a detailed account of what the victim said happened, including their moving furniture, him being in the house, her pushing him, his getting mad and dragging her to the bedroom, her grabbing something she had on a bedside table and hitting him, her grabbing his testicles, her foot hurting, her relenting, his throwing her on the bed and penetrating her "from behind first, then front," it taking a long time for him to "get satisfied," and then his letting her go and leaving.[51] The SANE documented the victim's

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[45] 3 RR 97-99.
[46] 5 RR 10-12.
[47] 5 RR 37.
[48] 5 RR 38-39.
[49] 5 RR 44, 47.
[50] 3 RR 99-100.
[51] 4 RR 94-96.

statements that Appellant penetrated both her anus and vagina with his penis.[52] She also observed redness and swelling on the victim's head, abrasions on her chest and arm, abrasions to her genitals, and three lacerations on the anus.[53] She collected dry secretions found on the victim's chest, arm, and anal and vaginal areas.[54] The SANE testified that the victim's injuries were consistent with her account of what happened.[55]

Two accounts of Appellant's statements after the assault.

Late on July 29, Appellant bought two beers at a store in the small town of San Isidro where he and the victim lived. He told the cashier, "I know I am going to jail."[56] When the cashier, who was not a close friend, asked what happened, Appellant said, "I just fucked [the victim] through the ass."[57]

Officers looked for Appellant that same evening and found him hiding in a vacant lot, between the victim's house and the house where he was staying.[58] On his way to the jail, he asked the transporting officer how long he was going to jail for, the officer told him he would have to wait until he went to court, and Appellant said,

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[52] 4 RR 102.
[53] 4 RR 97-99.
[54] 4 RR 100, 102.
[55] 4 RR 104.
[56] 4 RR 121, 124-25.
[57] 4 RR 125.
[58] 5 RR 50-54.

"that's what she deserved because she didn't pay him."[59] He added that he was going to be deported and would "come back and do the same thing."[60]

The forensic testimony.

The first forensic scientist to testify, a biologist who identified the items that might contain DNA, told the jury he detected semen on the victim's vaginal swabs but not the anal swabs.[61] He explained that a negative result for semen could still occur despite semen being present in an orifice if the place that was sampled happened not to contain semen.[62] The second forensic scientist, a serologist who conducted the DNA testing, testified that Appellant was more likely than anyone on Earth (barring an identical twin) to be the contributor of the DNA profile found on the sperm collected from the victim's vagina.[63] She also testified Appellant could not be excluded as a contributor to the mixture profile found on the chest swab.[64]

Appellant's defense at trial.

Appellant did not make an opening statement or present a case.[65] During his cross-examination of the victim, he introduced several photographs to show how the

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[59] 5 RR 91-92.
[60] 5 RR 92.
[61] 5 RR 123-24, 129-30, 136.
[62] 5 RR 131.
[63] 5 RR 158.
[64] 5 RR 158-59.
[65] 3 RR 58.

victim's house looked a day after the assault.[66] He asked her questions that went to her character generally,[67] her sexual history,[68] her memory and ability to accurately relate things generally,[69] the credibility of her claim that she had been raped (by any means) that day,[70] and whether she had a motive to falsely accuse Appellant.[71] He accused her of collecting Appellant's semen from a consensual sexual encounter and planting it at the scene.[72] Regarding the claim of anal penetration, he established that she could not remember if she told anyone other than the police officer that she had been penetrated in the anus.[73] His inquiry into penile penetration was brief: he asked

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[66] 4 RR 45.
[67] 3 RR 104 (if she had been dismissed from a teaching job).
[68] 4 RR 40 (where and how often she and Appellant had consensual sex); 4 RR 49 (whether she had sex with others); 4 RR 81-82 (whether she had sex with another man the day before the assault).
[69] 3 RR 108-12 (when the extraneous assault occurred in relation to their sexual relationship); 4 RR 59 (she took medications); 4 RR 60 (she could not remember what Appellant was wearing the day of the rape).
[70] 3 RR 108, 115-21 (the way she reported and sought help after the extraneous assault leading to the protective order was different than the accusation on trial); 3 RR 124-25 (whether the video of her police interview showed signs she was in physical pain); 4 RR 36 (whether she was strong enough to have fought him off); 4 RR 45, 52 (how the photos of her house around the time of the allegations were inconsistent with a struggle occurring); 4 RR 50-51 (she never reported Appellant violating the protective order); 4 RR 72-75 (there was no gun or knife involved).
[71] 4 RR 67-68 (whether she bought him a cell phone and was trying to control him); 4 RR 69 (how much or little she paid him for odd jobs); 4 RR 69 (whether she was mad when she learned he made a bet about sleeping with her).
[72] 4 RR 69-72.
[73] 4 RR 75.

whether she could have been penetrated at her age without any lubrication[74] and whether Appellant could achieve erection without any help given their 30-year age difference.[75]

On cross-examination of the SANE, the defense questioned whether a man could have an erection after being grabbed in the testicles.[76] He elicited that the victim did not indicate or recall whether Appellant had ejaculated.[77] He highlighted that the SANE report did not indicate that the victim had been "hit[]."[78] He questioned her opinion that a vagina could sustain a penis being forced into it and still show no physical evidence of trauma.[79] The defense established that the presence of anal lacerations did not "necessarily mean" that a penis made them; the SANE agreed that someone could inflict those same lacerations to himself by wiping too hard with "bad" toilet paper and pressing it too hard up the anus.[80]

On cross of the store cashier, defense counsel established that he was working illegally, asked why Appellant would confide something so intimate to the cashier, questioned whether he had misheard him, and suggested that his not being deported

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[74] 4 RR 76.
[75] 4 RR 77-78.
[76] 4 RR 107.
[77] 4 RR 107-08, 112.
[78] 4 RR 109.
[79] 4 RR 111.
[80] 4 RR 116-17.

for being and working illegally in the country was payment for his testimony favorable to "the law."[81]

On cross of the officer who interviewed the victim, counsel established that, even under the victim's account, she already had a bruise on her leg that Appellant saw before the alleged rape occurred.[82] He also elicited that she told the police that the assault went on for about 45 minutes and that she had only been slapped once.[83]

On cross of the investigator who collected Appellant's DNA sample, the defense established that, according to a police report, the victim had given the police a wad of toilet paper already in a plastic bag, and they did not have the wad tested.[84]

On cross of the transport officer, the defense clarified that, in Appellant's statement "that's what she deserves for not paying me," he never said he penetrated the victim's anus or said he put his sexual organ in the victim's anus.[85] He suggested it could have been a reference to a physical assault.[86] He reminded the jury of the indictment and reiterated that Appellant never admitted to any "rape" or "sexual assault on the elderly lady."[87]

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[81] 4 RR 125-28.
[82] 5 RR 43.
[83] 5 RR 44-45, 47.
[84] 5 RR 63-64.
[85] 5 RR 93-94.
[86] 5 RR 94.
[87] 5 RR 94-95.

On cross of the forensic analyst who ran the test for semen, defense counsel highlighted that Appellant was charged with aggravated assault by penetration of the anus.[88] He elicited clear testimony that the analyst had found no semen on the anal swab.[89] He asked, "you were brought here as an expert by the D.A. to determine if there was any penetration of the anus," and established that neither he nor any of the other forensic scientists could testify to evidence of anal penetration.[90]

The defense moved for a directed verdict on the ground that "there is no evidence either by facts or by expert [opinion] that would say there was any penetration of the anus by a sexual organ."[91] He asserted his view that the victim testified that she thought Appellant "penetrated through the anus" but that she could not remember.[92] In his view, the victim's testimony was, "I do not remember if I ever got penetrated or not through the anus."[93] He reiterated that none of the scientific experts testified that there was "any penetration of the anus" or that there was semen present in the anus.[94] The motion was denied.[95]

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[88] 5 RR 135.
[89] 5 RR 136.
[90] 5 RR 137, 161.
[91] 5 RR 167.
[92] 5 RR 167.
[93] 5 RR 167.
[94] 5 RR 167.
[95] 5 RR 168.

The jury charge.

In a paragraph entitled "Accusation-Aggravated Sexual Assault," the jury charge specified that Appellant was accused of penetrating the victim's anus by his sexual organ.[96] In the "Relevant Statutes" section, it set out aggravated sexual assault in the abstract by tracking the statutory language (rather than the more specific indictment allegation): "A person commits an offense if the person intentionally or knowingly causes the penetration of the anus of a person by any means."[97] It then set out the elements of aggravated sexual assault in a numbered list, again stating that it consists of intentionally or knowingly causing anal penetration of an elderly individual "by any means."[98] The definitions of the mental states of intentionally or knowingly causing penetration also said "by any means."[99] The application paragraph did not include "by any means," but it also did not specify it was "by defendant's sexual organ":

> **Application of Law to Facts**
>
> You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

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[96] CR 66.
[97] CR 67.
[98] CR 67.
[99] CR 67.

1. The defendant, in Starr County, Texas, on or about the 29th day of July, 2016, caused the penetration of the anus of [the victim] . . . .[100]

The defense did not object to "by any means" in the abstract of the jury charge or the failure of the application paragraph to specify "by the defendant's sexual organ."[101] After the charge conference but before the charge was read to the jury, the defense objected to one of the State's proposed closing argument Powerpoint slides because it listed the elements as "intentionally or knowingly caused the penetration of the anus of [the victim] *by any means*."[102] Counsel argued that "by any means," was not in the charging instrument, and, he alleged, not in the jury charge.[103] The prosecutor corrected him and indicated that "by any means" was in the jury charge.[104] Despite this, no one attempted to fix the issue in the jury charge.

Closing arguments and an objection to the State's Powerpoint.

In closing argument, the prosecutor told the jury: "We had to prove to you that [Appellant] committed this crime either intentionally or knowingly, and he caused the penetration of the anus of [the victim] by the defendant's sexual organ."[105] The

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[100] CR 67.
[101] 5 RR 172-79.
[102] 5 RR 184, lines 15-18; 5 RR 186, lines 16-19; 5 RR 187, lines 2-7.
[103] 5 RR 186.
[104] 5 RR 186-87.
[105] 5 RR 205.

prosecutor pointed to the victim's testimony that Appellant penetrated her "through the back" and said it was "with his *cositas.*"[106] The prosecutor reminded the jury that the State asked her if that was also called the penis and she had agreed.[107] The prosecutor did not suggest that penetration could be "by any means."

In the defense closing, counsel pointed out that nothing in the photographs of the house indicated anyone was fighting or bruised or getting banged up.[108] He argued that if he were being raped through the anus, he would fight back, and the house did not look like she had.[109] He asserted that a rapist would choke his victims, not grab them by the waist, and that there was no evidence of choking.[110] He challenged the time frame—that the attack supposedly happened at 1:30 but that she didn't report it until 4:30 or 4:45.[111] She didn't scream to her neighbor.[112] She didn't stop at numerous available places on the way to the JP court or even call 911.[113] He asserted that the victim was a "cougar" who was losing her "grip" on a younger man and falsely accused him of rape in retaliation for his not wanting her anymore.[114] He

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[106] 5 RR 205.
[107] 5 RR 205.
[108] 5 RR 210.
[109] 5 RR 211.
[110] 5 RR 211.
[111] 5 RR 212.
[112] 5 RR 212.
[113] 5 RR 512-13.
[114] 5 RR 213.

argued that she had kept the evidence from the last time she had sex with him and framed him.[115] He questioned whether the bruises were fresh and suggested that she may have scratched herself.[116]

He reminded the jury that the charge was not vaginal sexual-assault but anal, and that they should focus on that.[117] He directed the jury's attention to the accusation portion of the jury charge where it said "anus."[118] He argued that the jury charge says "anus" six times and not to get "derailed."[119] He argued that the only corroboration of anal penetration is the cashier's statement of what Appellant said, but that he worked at a store where the victim drank coffee every day, and that the cashier was on her side.[120] He alleged that the State didn't want to talk about the allegation of "anus" because there was no evidence or test confirming there had been anal penetration.[121] "No penetration by anything, by no means, by no organs."[122] He asserted that the anal lacerations could have been created by a person's own

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[115] 5 RR 213.
[116] 5 RR 215.
[117] 5 RR 216.
[118] 5 RR 216, lines 9-10.
[119] 5 RR 217.
[120] 5 RR 217-18.
[121] 5 RR 218.
[122] 5 RR 218.

fingers.[123] He reiterated that there were no sperm, fluids, or DNA.[124] He argued that "if anybody – if anything – somebody puts – puts – puts up your butt, up your ass, you know, you – you – you bleed" but emphasized there was no evidence of blood in the victims underwear or on the tissue.[125]

He also suggested that the victim was mad about the $200 bet and was getting even with a false accusation.[126] He argued that the State had brought evidence from forensic experts that had nothing to do with the case.[127] He reminded the jury, "vagina or no vagina, that's … not the charge" and that their obligation was the allegations in the indictment.[128] He added,

> I was always knowing that the word "anus" was there. It doesn't say that I raped you by putting my finger up your butt. It doesn't say if I put a pen up your butt. . . . It doesn't say [any] of that. It says the sexual organ of a person. Okay. So those are the things you have to do.[129]

Other than asking the jury not to decide the case based on sympathy for a 70-year-old lady, he closed by arguing: "There's no penetration on the anus. None. None. No blood. None. No… sperms. None. No fluids. No DNA from [Appellant.]. . . . [Y]our

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[123] 5 RR 218.
[124] 5 RR 218-19.
[125] 5 RR 219.
[126] 5 RR 220-21.
[127] 5 RR 221.
[128] 5 RR 221.
[129] 5 RR 222.

conclusion can only be …. the one on the bottom that says not guilty."[130]

The jury found him guilty.

The court of appeals's opinion.

On appeal, Appellant complained that the jury charge did not track the indictment's allegation of penetration by the defendant's sexual organ. The court of appeals agreed the jury charge was improperly broad and found egregious harm.[131] It held that the error "affected the very basis of the case because it allowed jurors to convict [Appellant] on the belief that he penetrated the complainant's anus by means other than his sexual organ."[132] It found there was a "significant possibility that [Appellant] was convicted without the jury unanimously agreeing . . . that he penetrated the complainant's anus with his sexual organ."[133] It asserted that the means of penetration was contested throughout the trial, pointing to evidence that semen was not found in the victim's anus. It asserted that Appellant "attest[ed] he did not penetrate the complainant's anus with his sexual organ"[134] and that the manner and means of penetration was a focal point of defense counsel's closing argument. It also held:

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130 5 RR 223.
131 *Castillo-Ramirez*, 2019 WL 3937270, at *2-3.
132 *Id*. at *3.
133 *Id*.
134 *Id*.

It is apparent from the record that the basis of [Appellant]'s defensive theory in this case focused on the specific manner and means of penetration. [Appellant] presented evidence and built a defensive theory around an indictment that required a conviction to be predicated on a finding of penetration of the complainant's anus by [Appellant's] sexual organ. A review of the evidence and counsel's arguments supports the conclusion that [Appellant] suffered egregious harm from the erroneous charge because it vitally affected [Appellant's] defensive theory. The jury charge deprived [Appellant] of his defensive theory to negate the alleged manner of penetration when the charge did not make the specific manner and means alleged in the indictment an element of the charged offense. In sum, [Appellant]'s defensive theory was rendered meaningless even though it was a viable theory in light of the evidence.[135]

[135] *Id.*

SUMMARY OF THE ARGUMENT

The application paragraph should have said penetration was "by defendant's sexual organ." But the error was harmless. The only evidence was that penetration occurred by Appellant's sexual organ. Appellant never claimed otherwise—despite making a whole host of other claims. The court of appeals got it wrong because they confused the "means" of sexual assault at issue. The fight (beyond whether it was fabricated) was between vaginal and anal penetration, not penile or other means; it was over *where* the victim was penetrated, not *with what*. And the *where* was specified in the jury charge. Moreover, the missing allegation—that he used his penis—was an implicit part of this rape trial. On this record, in concluding that Appellant penetrated the victim's anus, the jury necessarily would have found he used his penis.

ARGUMENT

The error was harmless in light of the actual defensive theories and contested issues, the state of the evidence and party's arguments, the jury charge as a whole, and other relevant information in the record.[136]

The defense did not contest the "means" the court of appeals thought it did.

The court of appeals would have been entirely correct if the charge failed to specify the orifice. While part of the defensive theory was that the victim fabricated the sexual assault allegation,[137] a large part of the defensive theory was that if a sexual assault occurred, it was vaginal—not anal as the State alleged.[138] This was the means of sexual assault that the defense contested in cross-examination (primarily of the forensic witnesses and officers) and hammered home in closing:

> Let's not get away from what the charge is . . . . the charge is not the vagina. . . . It's talking about anus. Do not lose focus . . . . They can bring charges because [the prosecutor] thinks [Appellant] screwed through the vagina. Tomorrow, they [the State] can do that. Today—today, the charge is this. Do not get sidetracked by what the charge is. . . . there's not a single one, not a single page in here [in the jury charge] that . . . talks about vagina. It talks about anus…[139]

As for the other means that was missing from the charge (the defendant's

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[136] *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (setting out factors to consider in assessing harm).
[137] 3 RR 111, 4 RR 30-31, 53, 58, 70-71.
[138] 4 RR 73-75; 5 RR 135, 162, 167.
[139] 5 RR 216.

sexual organ), there was no real dispute over that. To be sure, the defense asked questions to cast doubt on whether penial penetration occurred.[140] But this fit within the larger defense that none of the elements occurred and that the victim fabricated the allegations. It wasn't like the allegation of anal penetration, where the defense heavily relied on the State's choice to allege and prove the orifice that had less support in the forensic evidence. The defense never once suggested that there was some alternative instrumentality that he penetrated the victim with. On this record, it cannot be said to have "vitally affect[ed]" Appellant's defensive theory.

Not only that, the jury was not likely confused about what was required since both the prosecutor and defense counsel told the jury the proper law during closing.[141]

All the evidence showed penetration was done with a penis.

The error was also harmless because nothing in the evidence suggested penetration was by anything other than Appellant's penis. The court of appeals's brief account of the facts states that the victim alleged that Appellant put "his thing" in her "colon."[142] But given the prosecutor's clarifying questions that the victim considered "his thing . . . that man [sic] have" and "cositas" as other words for

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[140] 4 RR 75-76, 105, 116; 5 RR 135.
[141] 5 RR 205, 222.
[142] *Castillo-Ramirez*, 2019 WL 3937270, at *1.

"penis," there is no doubt the jury understood her to testify that Appellant's sexual organ penetrated her anus. This is particularly so when she described feeling it inside her.[143] Despite being on her stomach, she had the opportunity to see some of what was going on behind her when she turned her head from one side to another.[144] This evidence wasn't just legally sufficient—it left nothing from which a rational juror could infer there was something else that Appellant used.

Circumstantial evidence also strongly suggested Appellant was using his penis. Their prior sexual relationship had involved intercourse with his penis,[145] and on this occasion, he took off his clothes, which would not have been necessary if he used something else. The SANE opined that the anal lacerations were consistent with her account of penile penetration. And in his statement about anal penetration to the cashier, he used the word "fucked," which is strongly suggestive of penile penetration. Other evidence only made sense in the context of sex—such as the victim's remark to the SANE that Appellant was taking "a long time" to "get satisfied" when penetrating her anally and his telling her to "shut up," suggesting he was being distracted from something he was engaged in. In context, his "this is what you get for infidelity" statement suggested not punishment, but sexual territorialism,

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[143] The victim had experience in these matters. She had six children. 3 RR 102.
[144] 3 RR 92.
[145] 4 RR 76-77.

again pointing toward use of his penis.

The forensic evidence also left no room for a rational juror to conclude Appellant used something else. Perhaps in another trial one could infer from the absence of semen in the victim's anus and the presence of anal lacerations that there had been non-penile penetration. But not here. The reason for no semen in the victim's anus was that he switched from her anus to her vagina before ejaculating. Even if the jury doubted the victim's testimony on that point, they would have to invent evidence out of the clear blue to conclude on this record that Appellant penetrated her with a finger or some other object.

More than that, they would have to conjure up the theory themselves because no one at trial was suggesting anal rape with something else. Although the defense pointed to the absence of semen in the anus, it was not to argue that she had been penetrated by something else—just the opposite. Counsel argued that she had not been penetrated anally at all: "No penetration by anything, by no means, by no organs."[146]

Without any evidence or even the suggestion that penetration occurred by means other than his penis, no rational juror would have convicted Appellant for

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[146] 5 RR 218. *See also* 5 RR 211(defense counsel arguing that if someone was trying to penetrate him through the anus, he would fight back), 219 (defense arguing that no blood in victim's undergarments indicated she had not been penetrated anally).

that. Despite this, the court of appeals concluded that there was a "significant possibility" that one or more jurors may have done so.[147] Such a conclusion ignores the rest of the record and presumes the jury would have acted irrationally.[148] Further, harm must be actual, not just a significant possibility.[149] Here both the charge and the prosecutor admonished jurors not to consider anything not in evidence.[150] There is no reason to think they did.

The court's analysis of the whole charge and record overlooked still more.

The court of appeals's harm analysis omitted other factors. First, it under-appreciated the importance of the "accusation" section of the charge. Because this section told the jury the specific indictment allegation that Appellant used his sexual organ, and the verdict form said that the jury found the Appellant guilty "as charged

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[147] *Castillo-Ramirez v. State*, 2019 WL 3937270, at *3. Although the court of appeals expressed concern about a non-unanimous verdict, submission of an unindicted means does not implicate that right. If, for example, the State had alleged penetration by the defendant's finger as an alternative instrumentality, the defense could not require jurors to be unanimous about sexual organ or finger. Even if they disagreed, they still would have been unanimous on the "by any means" element of sexual assault. *See* TEX. PENAL CODE § 22.021(a)(1)(A)(i) (permitting anal penetration to be "by any means"); *Jourdan v. State*, 428 S.W.3d 86, 96 (Tex. Crim. App. 2014) ("The jury was not required to reach unanimity with respect to whether the appellant penetrated [the victim] with his penis or his finger during [the penetration of a single orifice of a single victim].").

[148] *See Black v. State*, 723 S.W.2d 674, 675 n.2 (Tex. Crim. App. 1986).

[149] *See Chambers v. State*, 580 S.W.3d 149, 154 (Tex. Crim. App. 2019), reh'g denied (Aug. 21, 2019) (requiring "actual—rather than merely theoretical—harm").

[150] 5 RR 196 (jury charge); 5 RR 228 (closing argument).

in the indictment,"[151] the court of appeals should have had confidence the jury found all of the allegations—including that Appellant used his sexual organ—beyond a reasonable doubt.

The court's harm analysis also failed to appreciate that only in the abstract instructions did the jury charge include the phrase "by any means."[152] Certainly, the application paragraph was not limited to "by the defendant's sexual organ," and should have been. But the application paragraph did not emphasize that all means were on the table by saying "by any means."[153]

Other information underscoring the error's insignificance.

Another relevant factor in assessing the impact of the charge error on this trial is that the missing allegation "by his sexual organ" is not a statutory manner and means, but a factual averment. The only statutory provision for anal rape of an adult is Penal Code § 22.021(a)(1)(A)(i), which prohibits non-consensual penetration of the anus "by any means."[154] The missing language here is non-statutory. Thus a

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[151] 5 RR 202; CR 66 (accusation in charge), 70 (verdict form).
[152] 5 RR 199, lines 15, 20 (abstract tracks statutory "by any means"), 200, lines 18-20 (application paragraph just says "penetration of the anus" without "by any means" or any other means); CR 67.
[153] 5 RR 200; CR 67 ("Application of Law to Facts").
[154] *Compare* Tex. Penal Code § 22.021(a)(1)(A)(i) (penetrating the victim's anus by any means without consent) *with* (a)(1)(A)(iii) (causing victim's sexual organ, without consent, to penetrate the *defendant's* anus).

variance in proof from the specific indictment allegation of sexual organ would not necessarily have been incorporated into the hypothetically correct charge for sufficiency purposes.[155] While this is not a sufficiency case, it suggests the omission was not the kind of error that would be egregiously harmful either.

Finally, the fact that defense counsel did not attempt to fix the charge's erroneous inclusion of the phrase "by any means" when it was drawn to his attention (and he was within the time to fix it) underscores its insignificance.[156] It would appear that fixing it in the Powerpoint was enough to avoid confusion. Like the consideration of contested issues and the state of the evidence, counsel's decision not to insist on exactitude in the charge was a relevant part of trial that indicates the error did not go to the heart of his defense.

Conclusion

This was a trial about a rape in the traditional sense. If the victim was penetrated, it was by Appellant's penis. And there was no danger he was convicted

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[155] *See Johnson v. State*, 364 S.W.3d 292, 298 (Tex. Crim. App. 2012) (setting out three categories of variances: (1) statutory, which are always material; (2) non-statutory that describe the allowable unit of prosecution, which are sometimes material; and (3) immaterial, non-statutory, which are never incorporated into the hypothetically correct charge); *see also Hernandez v. State*, 556 S.W.3d 308, 327 (Tex. Crim. App. 2017) (manner and means that do not define allowable unit of prosecution are not material and thus not incorporated into hypothetically correct charge).

[156] 5 RR 186-87; TEX. CODE CRIM. PROC. art. 36.14 (providing that counsel shall object to the jury instructions "[b]efore [the] charge is read to the jury").

for penetrating her with anything else. Appellant did not bank his defense on that specific means of penetration, and nothing else shows the mistake in the charge mattered. This Court should find the error harmless.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the judgment of the court of appeals and affirm the trial court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 6,018 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 23rd day of March 2020, the State's Brief on the Merits was served electronically on the parties below.

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